K&N Engineering, Inc. *and* International Association of Machinists and Aerospace Workers, AFL–CIO, District Lodge 725, Petitioner. Cases 21–RC–174486 and 21–RC–174700

October 12, 2017

DECISION ON REVIEW AND ORDER

BY CHAIRMAN MISCIMARRA AND MEMBERS PEARCE AND MCFERRAN

In this representation case the parties entered into a stipulated election agreement providing that enumerated classifications of "production employees" were eligible to vote in the election while employees in four maintenance classifications, whom the employer additionally contended should be included in the unit, would vote subject to challenge. The issue presented is whether the challenged ballots of those maintenance employees should be opened and counted where, as here, they are determinative to the results of the election. Applying *Odwalla*[1] and *Specialty Healthcare*[2] to the facts of this case, we find that the challenged ballots of employees in the four maintenance classifications should be opened and counted. Accordingly, we grant the Employer's request for review insofar as it argues that the four maintenance classifications are in the unit, and we remand this case to the Regional Director to open and count these challenged ballots and issue the appropriate certification. In all other respects, we deny the Employer's request for review of the Regional Director's Decision and Order Sustaining Challenges, Overruling Objections and Certification of Representative.

I. PROCEDURAL HISTORY

Pursuant to a Stipulated Election Agreement approved by the Acting Regional Director for Region 21 of the National Labor Relations Board, the parties agreed to an election in a unit of the Employer's full-time and regular part-time "production employees," including employees in more than 30 listed job classifications (including janitors), excluding all other employees, office clerical employees, professional employees, confidential employees, managers, guards and supervisors as defined by the Act. The Stipulated Election Agreement also provided that the eligibility of four classifications—Maintenance Leads, Maintenance Techs I, Maintenance Techs II, and Maintenance Techs III (collectively, "Maintenance Techs")—was not resolved, and that individuals in those classifications could vote subject to challenge.[3]

An election was conducted on May 12, 2016[4] where, of the approximately 641 eligible voters, 285 voted for the Petitioner, 271 voted against representation, and 30 ballots were challenged—a number sufficient to affect the results of the election.

On May 18, the Employer filed timely objections to the election, alleging that the Board agents conducting the election improperly allowed the Petitioner to speak to voters outside the polling place, that one of the Board agents identified himself to voters as being with the Petitioner, and that the Board agents failed to properly mark and identify two of the challenged ballot envelopes. The objections also alleged that during the critical period, the Petitioner and its representatives, agents, and supporters engaged in threatening, intimidating, and coercive conduct, created a general atmosphere of fear, coercion, and confusion, and distributed false, misleading and deceptive flyers.

On July 5, the Regional Director for Region 21 approved a supplemental stipulation between the parties resolving 11 of the 30 challenged ballots, agreeing to open and count 8 of them. The revised tally of ballots showed 289 votes for the Petitioner, 275 votes against representation, and 19 remaining determinative challenged ballots.

On August 1, the Acting Regional Director for Region 21 issued an Order directing a hearing on the 19 remaining challenged ballots and the Employer's election objections. The Order explained that 16 of the challenged ballots were cast by voters working in the Maintenance Tech classifications whom the parties agreed would vote subject to challenge. Another voter (classified as a Facilities Maintenance Technician) had been challenged by the Board agent because he was not on the voter list. The two remaining challenged ballots were in envelopes that did not list any voter identifying information or reason for the challenges. However, the Order stated that the Region administratively had determined that the envelopes contained the ballots of two voters who worked in a Maintenance Tech classification that the parties agreed to vote under challenge.

[1] *Odwalla, Inc.*, 357 NLRB 1608 (2011).

[2] *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011), affd sub. nom, *Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013).

[3] The Employer took the position that these maintenance employees should be included in an appropriate unit, while the Petitioner would have excluded them.

[4] All dates are in 2016 unless otherwise noted.

At the September 19 hearing,[5] the parties litigated the Employer's objections and the eligibility of the 19 challenged voters. The Employer also raised a new eligibility issue, asserting that the classification of Machine Adjustment Coordinator, Pleating (sometimes also referenced as "Maintenance Adjustment Coordinator, Pleating"), which was not specifically mentioned in the parties' Stipulated Election Agreement, should nonetheless be included in the bargaining unit. The parties also raised issues in their briefs with respect to the eligibility of the janitors, even though the Stipulated Election Agreement expressly provided that the janitors were included in the unit.

On October 24, the hearing officer issued a Report on Challenged Ballots and Objections. The hearing officer found that the Employer's objections lacked merit, and recommended that they be overruled in their entirety. The hearing officer also recommended overruling the challenges to the 16 ballots identified as being cast by voters in the Maintenance Tech classifications, because she found that the stipulated bargaining unit was not an appropriate unit without these classifications. However, the hearing officer recommended sustaining the challenges to the two ballots in the unlabeled challenge ballot envelopes, because she found insufficient evidence to adduce which voter had cast each of the ballots.[6] The hearing officer further recommended sustaining the challenge to the ballot cast by the Facilities Maintenance Technician, determining that the parties' Stipulated Election Agreement clearly and unambiguously excluded this job classification. The hearing officer also determined that the status of the Machine Adjustment Coordinator, Pleating was not properly before her, because it was not included in the Order Directing Hearing and because no individual in that classification had attempted to vote. Finally, the hearing officer rejected (1) the Employer's argument that the janitors should be excluded from the unit, notwithstanding that the parties' Stipulated Election Agreement expressly included them in the unit; and (2) the Petitioner's argument that if the stipulated unit were found inappropriate, the solution should be to exclude the janitors, not add the Maintenance Techs, to the unit. The Petitioner and Employer both filed exceptions to the hearing officer's report, and the Employer filed a response to Petitioner's exceptions.

On January 20, 2017, the Regional Director for Region 27 issued a Decision and Order Sustaining Challenges, Overruling Objections and Certification of Representative. In her decision, the Regional Director agreed with the hearing officer that the Employer's objections should be overruled. The Regional Director also adopted the hearing officer's recommendations to sustain the challenge to the Facilities Maintenance Technician's ballot, and to reject the Employer's postelection claim that the unit should include the Machine Adjustment Coordinator, Pleating position. As to the latter, the Regional Director noted that the parties' Stipulated Election Agreement did not list the Machine Adjustment Coordinator, Pleating classification among the inclusions or provide for that classification to vote subject to challenge. The Regional Director further noted that no one in that classification had attempted to vote, the Order Directing Hearing did not direct a hearing on this issue, and the Employer had not properly preserved the issue. The Regional Director also noted that if she were to reach the issue, the parties' intent to exclude the Machine Adjustment Coordinator, Pleating position was clear because the Stipulated Election Agreement expressly excluded "all other employees."

However, contrary to the hearing officer, the Regional Director sustained the challenges to the ballots cast by the 16 identified Maintenance Techs who voted subject to challenge pursuant to the parties' Stipulated Election Agreement. The Regional Director reasoned that the Employer had not met its burden of proving that the Maintenance Techs share an overwhelming community of interest with the stipulated inclusions, i.e. the production employees. The Regional Director also concluded, contrary to the hearing officer, that the ballots in the two unmarked challenged ballot envelopes had been cast by employees in the Maintenance Tech classifications—as proven by the administrative investigation, to which no party offered credible contrary evidence. Accordingly, the Regional Director concluded that those 2 ballots should be treated the same as the other 16 ballots cast by the other Maintenance Techs, and should not be opened and counted. Finally, the Regional Director rejected the Employer's contention that the janitors should be excluded from the unit, noting that it was contrary to the clear and unambiguous language of the parties' Stipulated Election Agreement to include them in the production unit.

The Employer filed the instant request for review contending that (1) the Regional Director erred in failing to set aside the election because of Board agent misconduct alleged in its objections; (2) the Regional Director erred in failing to find that the only appropriate unit consists of

[5] The cases were transferred from Region 21 to Region 27 for the purpose of adjudicating the matters covered by the Order Directing Hearing.

[6] The hearing officer did not dispute the results of the Region's administrative investigation, but found it was insufficient in the absence of the parties' agreement, or evidence adduced at the hearing establishing who cast each ballot.

all production workers, including the Maintenance Techs and the Machine Adjustment Coordinator, Pleating, but excluding the janitors and Facilities Maintenance Technician; and (3) if the election is not set aside, the challenged ballots in the unmarked envelopes should be counted along with the ballots cast by the 16-identified Maintenance Techs who voted subject to challenge.[7] The Petitioner filed an opposition to the Employer's request for review.[8]

Having carefully considered the Employer's request for review, we find that it raises no substantial issues warranting review as to the Regional Director's decisions to overrule the Employer's election objections and to exclude the Machine Adjustment Coordinator, Pleating classification from the unit. However, we agree with the Employer that the Regional Director erred on the challenged ballot issues. Accordingly, we grant review and reverse the Regional Director on the issue of the 18 challenged Maintenance Techs.

II. ANALYSIS AND CONCLUSIONS

Our analysis begins with *Odwalla*, which, like here, involved a Stipulated Election Agreement providing that certain agreed-upon classifications were in the unit, that other classifications proposed by the nonpetitioning party would vote under challenge, and where those challenges proved determinative. *Odwalla, Inc.*, 357 NLRB 1608, 1608, 1611 & fn. 27 (2011). *Odwalla* provides that *Specialty Healthcare* sets forth the proper framework for determining the placement of those challenged classifications. 357 NLRB at 1611 fn. 27. Contrary to the Regional Director, *Odwalla* does not hold that the agreed-upon classifications in the Stipulated Election Agreement (here, the production employees) are presumed to constitute an appropriate unit. Rather, as explained in *Odwalla*, the employees stipulated as included in the unit should be treated as the "petitioned-for" unit for purposes of the analysis in such circumstances. 357 NLRB at 1611 fn. 27. And *Specialty Healthcare* instructs that the initial inquiry is whether the petitioned-for unit (here, production employees) is readily identifiable as a group and shares a community of interest. 357 NLRB at 943, 944 fn. 25.

Here, although the stipulated unit of production employees is readily identifiable as a group,[9] we find, applying traditional community of interest factors, that it *does not* comprise an appropriate unit. The stipulated unit does not track any lines drawn by the Employer. See *Bergdorf Goodman*, 361 NLRB No 11, slip op 3–4 (2014); *Odwalla, Inc.*, 357 NLRB at 1612. It is not drawn along department lines because it includes employees from different departments. It is not drawn along functional lines, because it includes janitors who do not perform any production work. Nor is it drawn along supervisory lines as the janitors work in a different department from production employees and are separately supervised.

Although other community of interest factors may certainly overcome a petitioned-for unit's failure to track administrative or operational lines drawn by an employer,[10] we find that they do not do so here. While the janitors share some common terms of employment with other employees in the stipulated unit, especially health and welfare benefits, 401(k) plan, and leave benefits, the work of the janitors is not functionally integrated with the production employees, the janitors and production employees do not share common supervision, and there is no interchange between the janitors and the production employees. The janitors do not even clean the production areas.[11] And there is no evidence that the janitors and production employees have similar skills or training.

Because we find that the stipulated unit, again, limited to the production and janitorial employees, is not appropriate applying traditional community of interest factors, we reject the Petitioner's claim, and the Regional Director's conclusion, that the four Maintenance Tech classifications that the parties agreed to vote subject to challenge, and whose ballots are determinative, may be added to the unit only if they share an overwhelming community of interest with the production employees. As *Specialty Healthcare* makes clear, and as the hearing officer recognized, that heightened standard applies if, and only if, the petitioned-for (in this case stipulated) unit constitutes an appropriate unit applying traditional

[7] The Employer's request for review agrees with the Regional Director's finding that the ballots in the unmarked envelopes were cast by Maintenance Techs.

[8] No party has requested review of the Regional Director's adoption of the hearing officer's recommendation that the challenge to the ballot cast by the employee in the facilities maintenance technician classification should be sustained and the classification excluded from the unit.

[9] The stipulation lists specific job classifications and therefore is sufficient to specify the group of employees that the Petitioner seeks to include.

[10] See e.g., *Bergdorf Goodman*, 361 NLRB No. 11 slip op 3–4 & fn. 5 (2014) (noting, for example, that if employees in two different departments shared common supervision despite being located in different departments, that would show that the departmental distinctions were relatively less important in the organization of the work force).

[11] The hearing officer found that the production employees in each department are responsible for cleaning their respective departments.

community of interest factors. 357 NLRB at 944 fn. 25. As discussed above, we find it does not.[12]

As a result, we turn to the question whether the four Maintenance Tech classifications, whose status the parties agreed would be resolved after the election if their votes were determinative, share a community of interest with the stipulated inclusions. We find that they do share a sufficient community of interest to be included.[13]

As found by the hearing officer and the Regional Director, the production employees, janitorial employees, and the employees in the four Maintenance Tech classifications are all hourly employees, and have the same health and welfare benefits, 401(k) retirement benefits, and leave benefits. All of these employees are subject to the same employee handbook, which includes the Employer's attendance and disciplinary policies.[14] They also follow the same parking and clock-in procedures.

Further, the record demonstrates that including the Maintenance Techs effectively bridges many of the previously discussed gaps between the production and janitorial employees. Thus, the Maintenance Techs work in the same department as the janitors and share common supervision. Both the Maintenance Techs and the janitors attend the same safety meetings. The work of the Maintenance Techs is also functionally integrated with the work of the production employees. Maintenance Techs provide production-related support for the production employees as they repair, and perform preventative maintenance on, the machines production employees use. The maintenance techs also manufacture a small number of products (that are counted as part of the production employee's quota) in test-running repaired machinery, and there is evidence that production employees perform some preventative maintenance themselves. Although there is no interchange, the Maintenance Techs have some contact with the production employees: Maintenance Techs sometimes ask the production employees to describe the problem they are experiencing; production employees sometimes verify that a successful repair has been made in the presence of Maintenance Techs; and Maintenance Techs also sometimes instruct production employees about how the machinery should be operated to avoid problems. In addition, the Maintenance Techs work alongside a small number of production workers in performing certain weekend maintenance projects. Most of the approximately 20 Maintenance Techs work similar hours to the production employees, though at least 3 Maintenance Techs either start earlier or stay later.[15]

On those facts, we agree with the hearing officer that employees in the four specified Maintenance Tech classifications share a sufficient community of interest with the production and janitorial employees. Indeed, including the Maintenance Techs effectively ties the unit together, creating in particular a degree of functional integration that was missing between the production and janitorial employees alone. It is thus appropriate to include them in the unit. We therefore reverse the Regional Director's decision to sustain the challenges to their ballots, including the ballots placed in the two unmarked envelopes. Accordingly, we vacate the certification and remand the case to the Regional Director to open and count the 18 challenged ballots cast by the Maintenance Techs in the four classifications that the parties agreed should vote subject to challenge.[16]

[12] Although, as the Regional Director noted, the *Odwalla* Board did not analyze whether the agreed upon inclusions were appropriate under the first prong of *Specialty Healthcare*, that was only because the *Odwalla* Board concluded that "even assuming" the stipulated inclusions as construed were readily identifiable as a group and shared a community of interest, the Employer had "carried its burden of proving that the [group the employer sought to add and which voted subject to challenge] share an overwhelming community of interest with the included employees." *Odwalla, Inc.*, 357 NLRB at 1611. *Odwalla* states that the Board will treat the stipulated unit "as the petitioned-for unit" for purposes of the analysis, not as the appropriate unit. Id at 1611 fn. 27.

In addition, we put aside the *Specialty Healthcare* framework at this point because, as the Stipulated Election Agreement reflects, no party claimed yet additional employees—that is, beyond the four specified Maintenance Tech classifications—must be included in the unit to make it appropriate. As noted, the Employer untimely sought to include the Maintenance Adjustment Coordinator after the election.

[13] We observe that the parties' stipulation contemplates only two alternative units, and no party claims that a unit including the Maintenance Tech classifications would violate the Act or established Board policy.

[14] The record does not disclose the employees' relative wage scales.

[15] As noted, the hearing officer rejected the Employer's contention that the janitors should be excluded from the unit, and the Petitioner's contention that if the stipulated unit were found to be inappropriate, the appropriate solution to make the unit appropriate is to exclude the janitors, rather than to include the Maintenance Techs. We agree with the hearing officer (and the Regional Director) that excluding the janitors would be contrary to the parties' stipulation, which specifically provided for the inclusion of the janitors, and left only the status of the four Maintenance Tech classifications in dispute. The parties' stipulation did not provide for the janitors to vote subject to challenge, for their ballots to be segregated, or for them to be excluded in the event that the ballots cast by the Maintenance Techs were determinative and the Board were to find that the unit of janitors and production employees was inappropriate.

[16] Chairman Miscimarra disagrees with the *Specialty Healthcare* standard. See *Macy's Inc.*, 361 NLRB No. 4, slip op. at 25–32 (2014) (Member Miscimarra, dissenting). Thus, Chairman Miscimarra does not join in or rely on any aspect of the majority's discussion of *Specialty Healthcare* and standards arising under that case. He nevertheless finds, in agreement with his colleagues, that applying traditional community of interest factors, the stipulated unit of "production employees" is not appropriate, and further finds that the four classifications of Maintenance Techs share a community of interest with the stipulated inclusions (that is, the production and janitorial employees) under traditional community of interest principles. Thus, he agrees with his col-

ORDER

The certification is vacated. It is directed that the Regional Director for Region 21 shall, as soon as practicable, from the date of this Decision and Order, open and count the ballots of Alejandro Davila Jr., Harry Evans, Hector Irizarry, Ross Leja, Paul Likhterman, Thomas Manning, Richard Mejia, Douglas Morgan, Kevin Murphy, Samuel Nevarez Jr., Brian Nichols, Paul Ochoa, Christopher Panos, John Sanchez, Rene Solorio, Robert Vasquez, Jan Spencer Jr., and Raymundo Vasquez Jr. The Regional Director shall serve on the parties a revised tally of ballots and issue the appropriate certification.

Dated, Washington, D.C. October 12, 2017

Philip A. Miscimarra, Chairman

Mark Gaston Pearce, Member

Lauren McFerran, Member

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leagues that it is appropriate to include the four classifications of Maintenance Techs in the unit, and joins his colleagues in vacating the certification and remanding the case to the Regional Director to open and count the 18 challenged ballots cast by the Maintenance Techs in the four classifications that the parties agreed should vote subject to challenge. Finally, Chairman Miscimarra joins his colleagues in denying the Employer's request for review in all other respects.